UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
THE JOHN JOSEPH MOAKLEY U.S. COURTHOUSE
1 COURTHOUSE WAY – SUITE 2300
BOSTON, MA 02210

Helen Cameron,
Plaintiff

V. **Civil Action No. 1:07-12182-WGY**

City of Boston,
Boston Public Schools Department/Boston School Committee
Ray Shurtleff, Director, Office of Human Resources
Eddie Neal, Staff Assignment Specialist, Office of Human Resources
Defendant(s)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Now comes the Plaintiff and respectfully requests the Court deny the Defendants' Motion to Dismiss Plaintiff's Complaint, Claims, and Jury Demand. In support of this motion, Plaintiff relies upon the statements of fact and law asserted in the attached memorandum of law.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Plaintiff, Helen Cameron, (hereinafter " Plaintiff") submits this Memorandum of Law in support of her Opposition to the Motion to Dismiss signed and filed in this court by Andrea Alves Thomas, Attorney at Law, on behalf of the Defendants City of Boston, Boston Public Schools Department of Human Resources, Boston School Committee, Ray Shurtleff, and Eddie Neal (hereinafter, "Defendants or Boston")

Discussion, Arguments, and Memorandum of Laws/Cases:

In its Motion to Dismiss, the attorney for the Defendants generally challenges the legal sufficiency of Plaintiff's pleading under her chosen designated Rules 8 and 12. Rule 12 Motion to dismiss is optional with the defendant. However, it can be made only on the grounds of failure to state a claim upon which relief can be granted and on the following other grounds: 1) lack of subject matter jurisdiction, 2) lack of jurisdiction over person, 3) improper venue, 4) insufficiency of process or insufficiency of service of process, or 5) failure to join necessary or indispensable parties. (see F.R.Civ.P. 12(b)).

Plaintiff asserts here that: 1) federal question subject matter jurisdiction has been established in the content of Plaintiff's complaint; 2) each of the named Defendants, with the exception of Eddie Neal and Ray Shurtleff, had been served with Summons and Complaint by a United States Marshall at the time Defendants' Motion to Dismiss was filed. Defendants' attorney voluntarily submitted personal jurisdiction to the Court by making her plea for relief in the Motion on behalf of all named Defendants, including Eddie Neal and Ray Shurtleff (See Defendants Motion: Part III. Conclusion, page 15); 3) venue is proper in that both the Plaintiff and the Defendants have an address in Suffolk County, Massachusetts where this Court is located; 4) service of Process was sufficiently done by the United States Marshall and Return of Service was properly filed with the Court Clerk; and 5) joinder or nonjoinder of additional parties is Plaintiff's optional discretion. The only remaining admissible ground available to the Defendants' under Rule 12 is "failure to state a claim upon which relief can be granted".

The Plaintiff's pleading (Complaint) was filed in this U.S. District Court and assigned to Justice William Young. Upon acceptance of the filing and granting Plaintiff permission to proceed in forma pauperis, the Justice Young briefly evaluated the Plaintiff's pleadings and reserved his opinion on the merits for a later date. Subsequently, the Defendants' filed the herein Motion to Dismiss on the ground for failure to state a claim upon which relief can be granted.

The Defendants disagree with the Justice Young's evaluation and instead assert their objection to the form and sufficiency of the pleadings in the Complaint. The Defendants inserted a barrage of new assertions that were not pleaded to by the Plaintiff. In addition, the bulk of Defendants' challenges to the Pleadings have their basis in state rather than federal cases.

In their Motion to Dismiss, the Defendants controvert what is alleged in Plaintiff's Complaint and generally introduce additional, new facts that were not asserted by the Plaintiff. For example, their attorney introduced Plaintiff as "an African-American female who began working for Boston Public Schools in 1979 as a reading teacher." This averment is not only partially true but it was not presented that way in Plaintiff's Complaint. Such an insertion omitting other relevant facts negates Plaintiff's established prima facie case of discrimination based on her several protected classes. In Plaintiff's Complaint, she established her prima facie evidence of discrimination based, in part, on race, gender, ethnicity and color, but not on national origin. Attorney made reference to Plaintiff's employment start date which is also not asserted as a claim in Plaintiff's Complaint and thereby introduces additional controverted facts that extend beyond the statute of limitation and may require additional litigation. Also, in Part II. a and b of Defendants' Motion to Dismiss, the Defendants make reference to paragraphs 10, 11, 12, 13, 15, 17, 18, 20 and 28 of Plaintiff's Complaint. In that same manner as stated above, the Defendants introduced inadmissible reasons and explanations for their actions and assert new allegations into Plaintiff's complaint. Yet, Defendants provide no evidence or affidavits in support of their newly asserted facts. This style of Motion pleading violates Rule 11, F.R.Civ.P.

In addition, not once did the Defendants deny any of the allegations set out in Plaintiff's Complaint, but rather, all admit that Defendants' actions did occur and did occur in the manner as Plaintiff averred. Plaintiff alleges that she was injured by Defendants' actions and Plaintiff alleges that Defendants' actions were born of discriminatory intent. This is a matter for a jury to decide, not for the Defendants to decide in a Motion to Dismiss. Plaintiff hereby points out to the Court that federal rules limit the form and manner in which pleadings can be attacked under Rule 12 and permits the pleader to attack only what is on the face of the Complaint and does not permit the pleader to speak into the Complaint nor insert new facts.

In testing the sufficiency of Complaint in connection with a Rule 12 Motion, the Court has traditionally applied the following principles: 1. the Complaint need not contain the ultimate facts but rather only "a short and plain statement of the claim showing that the pleader is entitled to relief" (see Rule 8(a)(2) F.R.Civ.P.); the Supreme Court has stated that "the Complaint should NOT be dismissed unless the (lower) Court is certain that the Plaintiff cannot prove a set of facts in support of his claim that would entitle him to relief." (see also the Garcia case). And although Justice Black expressed a forgiving attitude toward pleading deficiencies, and, the lower Courts may have continued to pay attention to whether the Plaintiff indicates in the complaint that there is a factual basis for the claim, Form 9 of the Federal Rules relaxes the requirement that the Plaintiff specify the underlying failure of the Defendant upon which the claim is based. A general allegation of negligence, for example, is admittedly a conclusion of law but in this instance it is the best way to describe how the acts were done. Thus, Plaintiff's allegation of fiduciary negligence, et.al. is an allegation of the ultimate fact of breach of duty and therefore sufficient. (see Rannard v Lockheed and Newing v Cheatham). Additionally, the Federal

Rules relax the Field Code requirement of pleading "facts constituting a cause of action." (see Rule 8(a)(2) F.R.Civ.P.). Under Federal Rules, the purpose of the pleading is to put the Defendant(s) on notice of Plaintiff's claim; to identify the transaction(s) out of which the Plaintiff's claim arises. Discovery and other pre-trial procedures are relied on for full development of the facts. (see Rule 56 F.R.Civ.P and Conley v Gibson). The wording of the Rules seem to say that under Federal Rules, the distinctions among ultimate facts, evidentiary facts, and conclusions of law are therefore unimportant. Plaintiff agrees with Justice Young that her pleading is not "pristine". However, under the Federal Rules, it appears that any claim may be stated in basic pleading and general terms, and, precision in identifying the cause of action is not required. (see Rule 7(a), F.R.Civ.P)

Generally, Defendant challenges the length of Plaintiff's Complaint, 28 pages. In her Complaint, Plaintiff designated 5 Defendants. Each Defendant was given notice of the action with a Summons. Plaintiff described in detail, what she believed to be discriminatory actions carried out by each Defendant. Despite the absence of a specific requirement for allegations in the Rules, Plaintiff set out sufficient factual matter necessary to explain each element of her claim which can be proven. Specific pleading requires greater detail than that which is required by general allegations. (see Tomera v Galt). Plaintiff could amend and delete some details but because the jury will not read the Complaint, an amendment at this time would be an unnecessary waste of the Court's valuable time.

DefendantS also assert in their Motion that Plaintiff should have joined the Teachers Union in her Complaint. I believe Plaintiff has discretion whether to join other parties and nonjoinder of parties is not grounds under Rule 12 for dismissal of an action. (see Rule 21, F.R.Civ.P.)

Defendant introduces the use of McDonnell Douglas Analysis as the most appropriate method of analyzing the merits of Plaintiff's Complaint. However, the McDonnell Douglas framework is only one method of analysis of genuine issues of material fact. There are others. In her Complaint, Plaintiff outlined allegations under Title VII of mixed motives and disparate treatment discrimination. In mixed motive cases in Federal Court, a different form of analysis is applied. (see the Burton case). Also, in Federal Court in mixed motive and disparate treatment cases, the evidence presented by the Plaintiff can be direct or circumstantial (ibid at 19-20), an option not available under the McDonnell Douglas framework. Because the question of the Defendants' discriminatory motives, or "state of mind", is elusive and usually established by circumstantial evidence, in disparate treatment and mixed motive cases, the burden of proof is on the Defendant employer. (see U.S. v One Parcel of Real Property). For these reasons, the McDonnell Douglas framework in this case is inappropriate. Hypothetically speaking, the Court cannot make rulings on material evidence that is yet to be discovered. McDonnell Douglas framework of analysis is appropriate in State Court, not Federal. And, where state law differs from Federal law, Federal law takes precedence. (see the Rossiter case).

Furthermore, if this Court decides to use the McDonnell Douglas Analysis, it could work in both the Plaintiff's and the Defendants' favor since it cannot be used to defeat Plaintiff's claim but to: 1) "progressively sharpen the inquiry into the illusive factual question of intentional discrimination" thus save time on investigating the claim, and 2) "permit the jury to infer discriminatory animus and causation from certain other proof in the absence of direct evidence". (see Abramian, citing McDonnell Douglas).

In every case filed in Court, Plaintiff bears the initial burden of establishing a prima facie case and Plaintiff has done so on every count in her Complaint as was admitted to by the Defendants. For example, in her Complaint, Plaintiff describes herself as a black colored female over the age of 40; She performed her job well which Defendants cannot deny, she was terminated, Defendant employer sought to fill her position by hiring younger, male, and Caucasian personnel with similar qualifications as Plaintiff's, and that other employees absorbed Plaintiff's work; all allegations are a matter of record and available upon Discovery. (ibid.) In addition, Plaintiff can produce empirical as well as circumstantial evidence of each averment in her complaint such that each is a matter of public record and available upon calculated discovery and other means. And where Plaintiff can present no direct evidence of unlawful motive and causation, the two elements of mixed motive and disparate treatment discrimination can be inferred from other circumstances. (see Quinones v Buick).

To show a prima facie case of age discrimination, Plaintiff can show on Discovery substantial age differences of 5 or more years between the Plaintiff and the replacements. Plaintiff can prove intolerable working conditions, pretext in regard to budget constraints as reason for her lay-off, and violation of seniority rights and other breaches to her contract with Defendant Boston (see Currier v City of Boston for evidential grounds). Other requirements of the prima facie case may be added as the case develops (see, for example, the O'Connor case).

Defendant Boston challenges Plaintiff's allegation of violation of the Employee Retirement Income Security Act (ERISA). It is well known that Defendant Boston maintains pension and retirement programs designated as Defined Contribution and or Defined Benefit plans for its employees under which benefits accumulate according to a clearly determined formula. Under this formula, benefits can be estimated in advance of retirement but not after retirement. In the present case, money is to be contributed by the Defendant Boston to the participant Plaintiff's retirement account under Title I of ERISA which regulates the establishment, operation, and administration of said pension plans. Any denial of participants' voluntary participation violates ERISA. The function of Title I of ERISA is to ensure the establishment of effective conditions and safeguards to protect employee participants and beneficiary pension plans and to facilitate meritorious transactions. (see U.S.Department of Labor Fact Sheet, 2005 and prior). Plaintiff alleges that Defendant was negligent and breached its fiduciary duty to protect Plaintiff's retirement pension and benefits by failing to make its required contributions, and for other reasons. An allegation of negligence is admittedly a conclusion of law but it is an acceptable way for Plaintiff to describe how the action was done. And, an allegation of negligence has been treated in Federal Court as a sufficient allegation of the ultimate fact of breach of duty.

Defendants further assert that Plaintiff's failure to report to an ordered assignment constitutes poor performance. However, under the Civil Rights Act, refusing to obey an order reasonably believed to be discriminatory is a protected activity under Title VII (see current EEOC Compliance Manual, section 8).

Generally, in pleading special matters of fraud, libel and slander, etc. in regard to Defendants' fraudulent actions, Plaintiff stated that Defendant Eddie Neal knew of the falsity of his statements and Defendant Boston knew of the falsity of the statements made against the Plaintiff, a pristine employee for over 25 years, yet Defendant Boston supported it by taking no disciplinary steps to prevent or correct it. And, Plaintiff alleged that Defendant Ray Shurtleff had two city jobs in conflict of interest and that Neal was negligent in assigning an @ 60 year old woman with no experience with the age group, to an elementary school teaching position thereby placing the Plaintiff (and the students) at safety risk and Plaintiff was injured by all actions including but not limited to, the imposed requirement of changed qualifications and additional workload and hours without prior notice or opportunity for preparation or for a hearing. Here, Plaintiff pleaded facts giving rise to a "strong" inference of malice intent as expressed in F.R.Civ. P. Rule 9(b), the governing rule.

With regard to certain other portions of Plaintiff's complaint, alleged violations of her Civil Rights for example, Plaintiff alleged with specificity the basis for her belief that Defendants acted with forbidden animus. Plaintiff specifically states that she was retaliated against for bringing a complaint, for requesting accommodations for her disability, for participating in protected activity, et. al. (see for example Fisher v Flynn).

Elsewhere, the Defendants stated that portions of the Plaintiff's Complaint is "too vague" and ambiguous that Defendant cannot reasonably reply to it, then, Defendant went ahead and replied without moving for more definite statement. In this manner, Defendant used a Motion to Dismiss as predicate for a Rule 12 Motion which is not allowed in Federal Procedure (see U.S. v Board of Harbor Commissions). The Defendants know, or should know, that any Rule 12 Motion must specify the grounds upon which it is based and when based on asserted facts, these facts must be established by accompanying affidavits, depositions, and other evidence. (see Rule 56, F.R.Civ.P.) And, pursuant to this Rule, if the court chooses to evaluate Plaintiff's Complaint based on Defendants' Motion to Dismiss, all reasonable inferences must be made in favor of the Plaintiff. The Court may not choose between two versions of events and grant Summary Judgment to the party whose version seems more persuasive. In other words Defendants' conclusory assertion that Plaintiff lacks sufficient evidence to support her case is not sufficien to demand a dismissal of Plaintiff's case in its entirety. Defendants have made no prima facie showing tha they are entitled to a dismissal in that they have offered no affirmative evidence that negates any essentia element of Plaintiff's Complaint (see Celotex, Justice Brennan). Defendants have conducted no calculate discovery of evidence to demonstrate that Plaintiff's proposed evidence is inadequate. In fact, Defendant pleading does not identify all the issues in contention in the lawsuit and for this reason, pursuant to Rule 56(e), their Motion to Dismiss must be denied. Ironically enough, Federal rules govern procedure for any Motion under Rule 12 and scrutiny or challenges to the sufficiency of the pleadings are limited to the allegations of the pleading alone and consideration of evidentiary materials is not allowed.

The Defendants went beyond the face of Plaintiff's Complaint and called other materials to the attentio of the Court; other materials that are the function of the Answer, not the Motion to Dismiss.

The Defendants also raised that this Court cannot review matters brought before the EEOC and MCAD two fair employment administrative agencies. However, Defendant made no mention that Plaintiff asked the Court to use a plenary standard of review and to give no deference to the administrative agencies' decision.

Also, in considering a Motion to Dismiss, the Court must accept all facts pleaded as though they were true. The issue is whether-assuming the facts pleaded are true-such facts would entitle the Plaintiff to some form of judicial relief. If the Complaint alleges facts sufficient to constitute some valid cause of action, the motion to dismiss will be overruled (ibid). The only test herein is whether the complaint sets forth any good cause of action and Plaintiff argues that it does.

Where Plaintiff alleges issues outside the statute of limitation, Plaintiff effectively pleaded around the statute of limitation defense by stating that she continued to be paid incorrectly through 2004 and into 2005.

Defendants asserted several generally impermissible grounds for a Motion to Dismiss, made no general or specific denials of any of the designated averments in Plaintiff's complaint nor have the Defendants filed any material evidence, discoveries, or affidavits in support of their Motion to Dismiss as required by Rule 8 and 56, F.R.Civ.P and, if not specifically denied in Defendants' Answer those averments must be considered admitted; and therefore, their Motion to Dismiss herein is defeated, giving Plaintiff grounds for Judgment on her Pleadings (see Rule 8(d) F.R.Civ.P.).

Also, in their Motion to Dismiss, Defendants made a specific request for dismissal only with no request for alternative relief, made no showing that they are entitled to relief in the form of a dismissal as required by Rule 8(a), and asserted no general or specific denials of the designated averments in Plaintiff's complaint. Yet, Defendants asked the Court to dismiss all averments of Plaintiff's Complaint with prejudice. Pursuant to Rule 8, such a request subjects the Defendants to the obligations set forth in Rule 11 which (obligations) have not been met. (see Rule 8(b), F.R.Civ.P.).

It appears that the Defendants have failed to either investigate the factual and legal assertions made by the Plaintiff or have chosen to delay the proceedings unnecessarily to harass the Plaintiff with frivolous arguments about Plaintiff's writing style and the number of paragraphs in Plaintiff's Complaint, and by citing a conundrum of irrelevant cases and thereby needlessly increasing the cost of this litigation. The Motion to Dismiss addresses only portions of the Complaint but leaves other portions unaddressed, and as such, under said Rule 8, the Motion must be dismissed in its entirety. It also appears that Defendants' intention is to controvert all averments set out by the Plaintiff and perpetuate techinical rules of pleading.

The Defendants' Motion seems subject to the provisions of Discovery rules 26 – 37, the same as Plaintiff's Complaint.

Affidavit

Plaintiff is representing herself without legal representation in this matter and she understands that pursuant to Rule 11, F.R.Civ.P, she is subject to the same standards as for the obligations of a practicing attorney in affixing her signature to a Complaint filed in Court. Rule 11 provides that by signing a pleading Plaintiff certifies that she has made a reasonable inquiry in support of her position outlined in her Complaint. And, Plaintiff certifies that factual assertions have evidentiary support. (see Rule 11(b)(3), F.R.Civ.P., revised). The attorney(ies) for the Defendants are also subject to the standards of Rule 11.

Request for Relief:

Defendants appear to be applying state court Rules of Procedure to the Federal Question matter at hand. The federal standard for testing the sufficiency of a complaint is different than the requirements imposed by state courts. For example, the federal rules relax the requirement that the plaintiff specify the underlying failure of the defendant upon which the claim of negligence is based. For these reasons Plainti[illegible] requests the Court give no attention to Defendants' Motion to Dismiss, order a trial by jury on all disputed issues, order Defendants to Answer within 10 days or risk a default judgment being entered against them and judgment on the pleadings of undisputed issues in favor of the Plaintiff.

Signed ____________________ Date 2/14/08

CERTIFICATION

I, Helen Cameron, certify that on February 14, 2008, I mailed by first class mail, a copy of the above to: William Sinnott, Attorney for Boston and Andrea Alves, Attorney for Boston Public Schools Ray Shurtleff and Eddie Neal. at 26 Court Street 7th Fl. Boston 02108

Signed ____________________ Date 2/14/08